U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 February 2005

BALCA CASE No.: 2004-INA-53
ETA Case No.: P2002-WA-09632674/ET

In the Matter of:

EL SOMBRERO MEXICAN RESTAURANT,
Employer,

on behalf of

JORGE FUENTES,
Alien.

Appearance: Bart Klein, Esquire
Tacoma, Washington
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. El Sombrero Mexican Restaurant ("the Employer") filed an application for labor certification[1] on behalf of Jorge Fuentes ("the Alien") on April 30, 2001. (AF 55).[2] The Employer seeks to employ the Alien as a Cook, Specialty, Foreign-Food. This decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

On April 30, 2001, the Employer filed an application for labor certification on behalf of the Alien to fill the position of Cook. (AF 55-56). The Employer described the duties as planning menus and cooking Mexican style food, supplying recipes, suggesting methods for cooking procedures, estimating food consumption, maintaining kitchen equipment, and preparing Mexican specialty dishes, dinners, desserts, and other foods. (AF 55). The Employer required two years of experience in the job offered. The Employer also amended the job offer to note that the Alien will supervise up to four employees.

An issue regarding the prevailing wage as opposed to the wage offered was the subject of two remands by the CO to the state employment agency. The Employer, however, in all communications regarding the wage issue argued that because the job opportunity involved supervision, the Service Contract Act ("SCA") prevailing wage was inappropriate. (AF 31-48).

In the Notice of Findings ("NOF"), issued July 23, 2003, the CO found that on the ETA 750A, the amended supervisory requirement in item 17 was not reflected in the job duties in item 13. (AF 27-30). The CO noted that the Alien did not have the required two years of experience in the job opportunity with supervisory duties, nor did the advertisement or job posting indicate any supervisory duties. The CO stated that if this was a new job offer, the Employer should submit a new application. The CO also stated that the occupation was one for which a prevailing wage determination had been made under the Davis-Bacon Act and/or SCA. The prevailing wage for the occupation of Cook, Specialty Foreign Food is $15.66 an hour. The Employer was directed to amend the $10.90 per hour wage listed on the application to the prevailing wage of $15.66 per hour and to retest the labor market. Finally, the CO noted that the Employer advertised the job offer for only two days, not three days, as required by 20 C.F.R. §§ 656.21(b)(1)

and 656.21(g). The CO stated that the Employer could rebut this finding by submitting a statement that it is willing to readvertise for at least three consecutive days.

In its rebuttal, dated August 8, 2003, the Employer argued that the SCA wage does not apply to Cook, Specialty Foreign Specialty Food if they supervise workers. (AF 8-26). The Employer cited an email from Mr. William Kartman of the U.S. Department of Labor in Seattle, Washington. In addition, the Employer stated that numerous approvals had been received for applications for Cook, Foreign Specialty Food where the ETA 750A item 17 stated that the alien will supervise employees and the SCA wage was not used. The Employer also stated that in all of those approved cases, the supervisory duties were not included in item 13 in the description of the job duties. (AF 8-9).

The CO issued the Final Determination ("FD") on August 19, 2003, denying the Employer's application for labor certification. (AF 6-7). The CO found that item 17 of the ETA 750A appeared to have been modified to avoid paying the applicable SCA wage. The CO stated that the local office assigned the SCA wage because there were no supervisory duties stated on item 13 of the ETA 750A. The CO noted that the Employer was given ample opportunity to correct the deficiencies and cited the remand correspondence of January 31, 2003 and April 10, 2003. Based on the Employer's failure to offer the prevailing rate, the application for labor certification was denied. (AF 7).

By letter dated August 26, 2003, the Employer requested review by this Board. (AF 1-5). The Employer again argued that the NOF and FD failed to comment on the advice and practice of the U.S. DOL Seattle office that the SCA wage does not apply to Cook, Specialty Foreign Specialty Food if they supervise workers. The case was docketed by the Board on January 21, 2004.

DISCUSSION

In determining the prevailing wage under 20 C.F.R. § 656.50(a)(1), if the job opportunity is an occupation which is subject to a wage determination under the Davis-

Bacon Act ("DBA"), 40 U.S.C. §§ 276a *et* seq., 29 C.F.R. Part 1, or the McNamara-O'Hara Service Contract Act ("SCA"), 41 U.S.C. §§ 351 *et seq*., 29 C.F.R. Part 4, the prevailing wage is the rate required under the statutory determination. *Standard Dry Wall*, 1988-INA-99 (May 24, 1988)(*en banc*). In this case, the Employer argues that the job opportunity is excluded from the SCA prevailing wage because the job opportunity includes supervision.

In reviewing the record, we note the job opportunity includes supervision of one dishwasher. (AF 61-62). This is quite different than a job opportunity which includes general supervision over kitchen activities. At that level of supervision, the job opportunity would be more appropriately titled Chef or Head Cook. While the definitions of Cook I and Cook II under the Service Contract Act state "[e]xcludes food service supervisors and head cooks who exercise general supervision over kitchen activities," that phrase is not interpreted to exclude this particular job opportunity, which includes supervision of one dishwasher. The phrase clearly intends to exclude employees who supervise the general kitchen activities, including other cooks, as noted by the phrase "head cooks." The job duties set forth in this application for labor certification are a reasonably good fit with the job description of Cook II. It appears that the Employer has added the duty of supervising one dishwasher to attempt to remove this position from the SCA wage classification.

Applying SCA classifications in making labor certification prevailing wage determinations is inherently an inexact science that requires an exercise of discretion on the part of the CO. What is sought is a reasonably good fit, not necessarily a perfect fit. *El Rio Grande*, 1998-INA-133 (Feb. 4, 2000) (*en banc*). We find it was reasonable for the CO to classify this job opportunity for a "cook, specialty foreign food" with supervision of one dishwasher to the SCA Cook II definition.

The email correspondence from the Seattle U.S. DOL office upon which the Employer relies does not distinguish between the supervision of one dishwasher and the supervision of kitchen operations by a Head Cook or Chef. In addition, that correspondence did not consider the specific circumstances and job duties of this particular labor application.

Thus, based on the above, we agree with the CO that the SCA Cook II definition is appropriate for this job opportunity. Since the job opportunity is an occupation which is subject to the SCA, we find that the CO determined the appropriate prevailing wage. We reject the Employer's arguments that this position is not subject to the SCA definition because the employee will supervise one dishwasher.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.